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No. 07-923

In the Supreme Court of the United States

TAE KYONG KIM, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for discretionary relief from removal under 8 U.S.C. 1229b (2000 & Supp. V 2005).

2. Whether petitioner is removable because he committed a "crime of domestic violence" under 8 U.S.C. 1227(a)(2)(E)(i).

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OPINIONS BELOW

The oral decision of the court of appeals (App., *infra*, 1a-3a[1]) is unreported. The order of the court of appeals affirming for the reasons stated from the bench (Pet. App. B1-B3) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. C1-C5, E1-E3) and the immigration judge (Pet. App. D1-D9, F1-F28) are unreported.

[1] In this case, the court of appeals ruled from the bench, and no official transcript was prepared. Because petitioner did not include a transcript of the court of appeals' ruling with the petition, the government obtained an audio recording from the court of appeals and transcribed the relevant portion. App., *infra*, 1a-2a. The government will make the audio recording available to the Court upon request.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2007. A petition for rehearing was denied on October 10, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien is removable if he is convicted of a "crime of domestic violence." 8 U.S.C. 1227(a)(2)(E)(i). The Attorney General, in his discretion, may cancel an alien's removal if the alien meets certain eligibility requirements. 8 U.S.C. 1229b(a). To be statutorily eligible for cancellation of removal, an alien must demonstrate that he has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony. *Ibid.*

In addition to satisfying the three statutory eligibility requirements, an applicant for cancellation of removal must establish that he warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). Whether an applicant warrants discretionary cancellation of removal is a case-specific determination made by "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

b. Since 1996, the INA has barred federal court review of certain discretionary decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b [the INA's cancellation of removal provision].

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D) (Supp. V 2005).

2. Petitioner, a native and citizen of Korea, was admitted to the United States as an immigrant in 1978. Pet. App. F2-F3; A.R. 531. In March 2000, he pleaded guilty to a state domestic violence offense. Pet. App. F3; A.R. 531; see Mich. Comp. Laws Ann. § 750.81(2) (West 2004). The former Immigration and Naturalization Service commenced removal proceedings against petitioner. Pet. App. F2-F3. Petitioner conceded that he was subject to removal under 8 U.S.C. 1227(a)(2)(E)(i) because he had been convicted of a "crime of domestic violence," but he sought discretionary cancellation of removal. Pet. App. F3.

The immigration judge (IJ) found that petitioner was removable as charged and denied his application for cancellation of removal. Pet. App. F1-F28. She explained that, in addition to meeting the statutory requirements for cancellation of removal, petitioner bore the burden of demonstrating that "relief is merited in the exercise of discretion." *Id.* at F13. To determine if discretionary relief was warranted, the IJ "balance[d] the adverse factors evidencing [petitioner's] undesirability * * * as a permanent resident against the social and humane * * * factors presented on [his] behalf." *Id.* at F13-F14 (citing *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998); *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978)).

The IJ performed a lengthy analysis of the positive and negative equities surrounding petitioner's application. Pet. App. F15-F27. She explained that petitioner's positive equities included that he has four United States citizen children, with whom he is close; that he has resided in the United States for 23 years; that his mother and sisters are in the United States; and that he has businesses and property in the United States. *Id.* at F16-F17. But the court also noted the substantial negative equities in petitioner's case. She explained that petitioner lied consistently during his hearing about his criminal history, his charitable contributions, and his businesses. *Id.* at F17-F24. For example, petitioner initially stated that he had no arrests other than for his domestic violence offense, but, after extensive questioning, he admitted to arrests for a violent crime in Korea and for counterfeiting and fraud in the United States. *Id.* at F23-F24. Similarly, petitioner originally claimed that his businesses were very successful and that he made significant charitable contributions, but those

claims were belied by his tax returns. *Id.* at F21-F22, F25.

The IJ recounted the circumstances of petitioner's domestic violence offense, in which he grabbed his wife by the throat, told her he was going to kill her, threw her on the floor, kicked her in the head, pursued her with a fireplace poker, and then attacked her with a scissors. Pet. App. F19-F20; see A.R. 491-500, 508-514. The IJ noted that petitioner's domestic violence offense "is a serious offense and it is clear from the police report and the documentary evidence * * * that [petitioner] did inflict harm and injury on his spouse, although he denies doing so." Pet. App. F27; see *id.* at F19-F20. The IJ also found that petitioner lied about whether he had reconciled with his wife and whether he still lived in their home. *Id.* at F18-F21, F24; see *id.* at F26 (noting that petitioner's "own wife did not even write an affidavit stating that she wished her husband to remain in the United States to assist her in the raising of their three citizen daughters").

Overall, the IJ found that petitioner's testimony was "inconsistent internally," Pet. App. F21, and that his "claims of remorse and rehabilitation [were] empty given [] his otherwise incredible testimony to this Court," *id.* at F26-F27. The IJ also found that petitioner's witnesses appeared to be "providing false testimony" and seemed to be "willing to provide any statements to assist [petitioner]," even if those statements were "inconsistent with [the] objective evidence submitted." *Id.* at F24, F26.

The IJ thus concluded that, despite petitioner's "long residence" in the United States, as well as his "children and siblings" here, he "does not deserve the exercise of discretion," because he committed a serious domestic

violence offense, did not demonstrate rehabilitation, and lied throughout his testimony. Pet. App. F26-F27.

Petitioner appealed, and the Board of Immigration Appeals (BIA) returned the case to the IJ because a tape of part of the Immigration Court proceedings was blank. Pet. App. E1-E3. The IJ held another hearing in which petitioner was permitted to put on additional evidence. A.R. 36-111.

The IJ again denied petitioner's application for discretionary cancellation of removal. Pet. App. D1-D9. The IJ noted that petitioner, despite "numerous opportunities to reconcile his testimony in his first hearing with his testimony" at the second hearing, continued to lie. *Id.* at D4. The IJ noted that, by the time of the second hearing, petitioner and his wife had divorced, and the IJ found that they had separated by the time of the first hearing, even though petitioner claimed that they had reconciled and were living together after his domestic violence offense. *Id.* at D4-D7. The IJ found that the significant negative equities (including the fact that petitioner "clearly provided false testimony * * * to obtain * * * cancellation of removal") outweighed petitioner's family ties in the United States, and thus there was "no reason to change [her] earlier decision" that petitioner did not deserve discretionary cancellation of removal. *Id.* at D8-D9.

3. The BIA affirmed. Pet. App. C1-C5. It rejected petitioner's argument that the IJ erred in balancing the positive and negative equities in his case, concluding that the "Immigration Judge properly found [petitioner] to be ineligible for a discretionary grant of cancellation of removal based on a balancing of the positive and negative factors in his case, including his 2000 conviction for domestic violence against his former wife which resulted

in her physical injury." *Id.* at C3. The BIA agreed with the IJ that petitioner failed to demonstrate "genuine rehabilitation or remorse which would tip the balance of the equities in [petitioner's] favor." *Id.* at C4. The BIA also noted petitioner's "lack of candor" as a negative factor. *Id.* at C3 n.2.

The BIA also rejected petitioner's challenges to the procedures used at the hearing, concluding that petitioner was properly placed under oath when he decided to stop testifying in English and start testifying in Korean and that the IJ did not improperly "hold[] [petitioner] criminally responsible for perjury and providing false testimony." Pet. App. C4-C5.

4. The court of appeals affirmed in a ruling from the bench at the conclusion of oral argument. App., *infra*, 1a-3a. The court first found that it had no jurisdiction to consider petitioner's argument that the BIA should have balanced the equities differently in his case and granted him discretionary cancellation of removal. *Ibid.* The court explained that petitioner's argument was that there "was an abuse of discretion in the [agency's] weighing of the factors," but that "the immigration judge in both hearings and the BIA in its written decisions did balance the equities," and its discretionary decision to deny cancellation is not reviewable under 8 U.S.C. 1252(a)(2)(B) (2000 & Supp. V 2005). App., *infra*, 2a; see Pet. C.A. Br. 13-16.

The court also rejected petitioner's argument (Pet. C.A. Br. 19) that the BIA denied him due process by "deny[ing] his applications based on conclusions that are unsupported by the record or that resulted from a mischaracterization of the evidence." The court held that "there was plenty of due process here" because "all the normal aspects of due process were carried out":

petitioner was able to be heard, was represented by a lawyer, and had a translator available when he decided to testify in Korean. App., *infra*, 2a. The court noted that petitioner was trying to "cloak a[n] abuse of discretion argument [as] a due process argument" and that his argument that the agency abused its discretion in weighing the equities simply was not reviewable. *Ibid.*

The court of appeals then issued a written order in which it "affirmed" "for the reasons stated from the bench." Pet. App. B1-B3.

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the court of appeals erred in finding that it lacked jurisdiction to review the BIA's denial of the discretionary relief of cancellation of removal. The decision below is correct, and it does not conflict with any decision of this Court or any other court of appeals. The decision below is also unpublished and non-precedential, and thus it cannot give rise to the type of circuit conflict that could warrant this Court's review. Further review of petitioner's fact-bound claim is therefore unwarranted.

a. The court of appeals correctly found that it lacked jurisdiction to review petitioner's claim that his situation merited a discretionary grant of cancellation of removal. Under the express terms of 8 U.S.C. 1252(a)(2)(B)(i), no court shall have jurisdiction to review a judgment "regarding the granting of relief under * * * [8 U.S.C.] 1229b." The relief petitioner sought, discretionary cancellation of removal, is relief under Section 1229b, Pet. App. F3, and his argument on appeal was that the BIA erred in denying him that discretionary relief based on a consideration of the positive and negative equities in his particular case. App., *infra*, 2a; see Pet. C.A. Br. 13-

16. The court of appeals thus correctly found that it lacked jurisdiction to consider the argument under Section 1262(a)(2)(B).

The court of appeals also correctly found that petitioner's claim does not fall within the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005). As petitioner himself has recognized (Pet. 2; Pet. C.A. Br. 12-13), cancellation of removal is discretionary, and whether an applicant has met his burden of demonstrating that cancellation is justified depends on the facts of his particular case. See *In re C-V-T-*, 22 I. & N. Dec. at 10-12; *In re Marin*, 16 I. & N. Dec. at 584-585. Here, there was no serious dispute about the applicable legal standards; as both the IJ and the BIA recognized, settled legal precedent directs the weighing of the positive and negative equities to determine if an exercise of discretion is warranted in the particular case. See Pet. App. C3, F13-F15. Petitioner's argument was that the BIA should have granted him cancellation of removal in the exercise of discretion because he did not intend to deceive the IJ and because he showed sufficient evidence of remorse for his domestic violence offense. See Pet. C.A. Br. 13-16; see also Pet. 13-14. Petitioner's disagreement with the IJ's and BIA's application of settled precedent to the facts of his case does not raise a "constitutional claim[]" or "question[] of law." Instead, his claim is nothing more than a challenge to the exercise of the BIA's broad discretion, and "challenges to the exercise of routine discretion * * * do not raise 'constitutional claims or questions of law.'" *De La Vega* v. *Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006); see App., *infra*, 2a.

Although petitioner attempted to recast his claim as one raising questions of law by asserting that the BIA departed from its own precedent, Pet. C.A. Br. 13-16, the court of appeals correctly recognized that the claim was nothing more than a challenge to the agency's discretionary decision. Petitioner and the government agreed on the governing legal standard, Pet. C.A. Br. 12-13; Gov't C.A. Br. 22, and petitioner's argument that the BIA failed to follow its own precedent was simply an argument that the BIA should have given more weight to his assertions of rehabilitation and remorse, Pet. C.A. Br. 15-16. Similarly, while petitioner now suggests (Pet. 11) that the BIA improperly "ma[de] its own findings of fact," he does not identify what facts the BIA impermissibly found or how such fact-finding constituted legal error, and the BIA's decision makes clear that it relied on the IJ's factfinding, see Pet. App. C1-C5. Petitioner's claim amounts to a quarrel with the manner in which the IJ and the Board balanced his equities, and thus the court of appeals lacked jurisdiction to consider that claim. Indeed, if petitioner's challenge to the BIA's exercise of its statutorily conferred discretion were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 126 S. Ct. 2973 (2006).[2]

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[2] Review is also unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the result in this case would be

The court of appeals also correctly rejected petitioner's attempt to recast his disagreement with the agency's discretionary decision as a due process claim. Petitioner's sole "due process" argument was that he was deprived of "a meaningful opportunity to present his application" "when the BIA denied his applications based on conclusions that are unsupported by the record or that resulted from a mischaracterization of the evidence." Pet. C.A. Br. 19. Petitioner's invocation of the Due Process Clause does not change the nature of his claim, which amounts on this record to nothing more than a challenge to the agency's exercise of its discretion. As the Third Circuit recently explained, the federal courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim" in determining whether a claim is reviewable under Section 1252(a)(2), because "[t]o do otherwise would elevate form over substance and would put a premium on artful labeling." *Jarbough* v. *Attorney Gen. of the United States*, 483 F.3d 184, 189 (3d Cir. 2007).

In any event, in addition to finding that it lacked jurisdiction over petitioner's claim cloaked in due process terms, the court of appeals also found no substance to the claim insofar as foundational elements of due pro-

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the same, because neither the IJ nor the BIA adopted a new legal rule for evaluating applications for cancellation of removal. For example, petitioner suggests (Pet. 13-14) that the BIA changed its legal standard to require a showing of rehabilitation or remorse in every case. But settled BIA precedent makes clear that, while rehabilitation is not an absolute prerequisite in every cancellation case involving an alien with a criminal record, it may be considered as a relevant factor and an applicant "who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion." *In re C-V-T-*, 22 I. & N. Dec. at 12.

cess were concerned, concluding that petitioner received a fair hearing and all the process he was due. App., *infra*, 2a. Petitioner contends (Pet. 14) that he has a due process right to a grant of discretionary cancellation of removal, but due process guarantees that a certain process be followed, not that a certain outcome be reached. *E.g., In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.) ("[P]rocedural due process does not protect litigants from any particular outcome; instead it protects litigants from arbitrary denials of rights."), cert. denied, 493 U.S. 821 (1989). Petitioner's "attempt to 'dress up' his challenge with the language of 'due process'" is insufficient to establish federal-court jurisdiction over his claim. *Avendano-Espejo* v. *Department of Homeland Security*, 448 F.3d 503, 505-506 (2d Cir. 2006). "[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection." *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). While petitioner does have a liberty interest in avoiding removal from the United States, that liberty interest is accorded constitutionally adequate due process by affording petitioner notice and an opportunity to contest the charge of removability, which was done in this case.

b. Petitioner asserts without explanation (Pet. 8-10, 15-17) that the unpublished, oral decision below conflicts with other Sixth Circuit decisions and with decisions of the Third, Seventh, Eighth, and Ninth Circuits. Petitioner is mistaken. Moreover, the unpublished oral decision below could not give rise to the type of conflict in published decisions in the courts of appeals that would warrant this Court's review.

As an initial matter, the alleged conflicts between the decision below and other Sixth Circuit decisions provide

no basis for this Court to grant review, because it is not the Court's task to reconcile intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); Sup. Ct. R. 10. If a conflict existed, it should be left for the Sixth Circuit to resolve.[3]

Further, the decision below does not conflict with the decisions of the Third, Seventh, Eighth, and Ninth Circuits cited by petitioner. See Pet. 10, 15-16. In three of those cases, the courts of appeals recognized that they generally lacked jurisdiction to "review the BIA's decision to deny an alien cancellation of removal" but noted that they could consider purely legal questions. *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054-1055 (8th Cir. 2006); see *Morales-Morales* v. *Ashcroft*, 384 F.3d 418, 421 (7th Cir. 2004) (finding jurisdiction to review statutory interpretation question regarding eligibility requirements); *Cabrera-Alvarez* v. *Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (similar). The other case concerns withholding of removal, a different form of relief than cancellation of removal, and it is inapposite because the court there found that the decision at issue was not a discretionary decision entrusted to the Attorney General, whereas petitioner concedes that the BIA's deter-

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[3] In any event, there is no such conflict. *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 630-631 (6th Cir. 2006), addressed jurisdiction to review a denial of a continuance, not a denial of cancellation of removal, and thus presents no conflict. *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005), is similarly inapposite. In that case, the court of appeals stated that a finding that an alien "failed to demonstrate a continuous physical presence," one of the statutory eligibility requirements for cancellation of removal, "is a non-discretionary factual determination and properly subject to appellate review." *Ibid.* In this case, in contrast, there is no question raised about continuous physical presence; petitioner merely disagrees with the BIA's weighing of the equities.

mination that he does not merit cancellation of removal is such a discretionary determination. See *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 101, 103-104 (3d Cir. 2006) (finding jurisdiction to consider statutory interpretation question regarding eligibility for withholding of removal).

Petitioner has not explained how the decision below is in conflict with any of the decisions he cites or even what predicate legal question he believes is in dispute in his case. The fact that courts have recognized that other applicants for cancellation of removal raising other, different claims, such as statutory interpretation arguments, have raised questions of law does not mean that those decisions conflict with the decision below. Rather, it highlights the fact that petitioner's challenge was merely a disagreement with the BIA's weighing of the equities in making a purely discretionary decision. And the courts of appeals agree that they lack jurisdiction to review such a claim. See, *e.g.*, *Elysee* v. *Gonzales*, 437 F.3d 221, 223-224 (1st Cir. 2006) (because the alien's claim merely "attack[ed] * * * the factual findings made and the balancing of factors engaged in by the IJ," it "d[id] not raise even a colorable constitutional claim or question of law"); *Higuit*, 433 F.3d at 420 (no jurisdiction to review alien's claim that the IJ erred in "balanc[ing] [the alien's] positive and negative attributes" because it was "an equitable determination based on factual findings rather than a question of law").

2. Petitioner contends (Pet. 9, 16-19) that he is not removable because he was not convicted of a crime of domestic violence. That claim was raised for the first time in the petition for a writ of certiorari, and review should be denied on that basis. Moreover, petitioner asserts no disagreement in the circuits on this point, and

the finding of removability is correct. Petitioner's fact-bound claim therefore does not warrant further review.

Petitioner's new claim was not included in any brief to the court of appeals, nor was it raised in the petition for rehearing en banc. Not only did petitioner fail to raise the claim below, but he has conceded throughout this litigation that he is removable based on his domestic violence conviction. See Pet. App. F3 ("[Petitioner] further conceded that he was subject to removal under Section 237(a)(2)(E)(I) of the Act."); Pet. C.A. Br. 3 ("[Petitioner] admitted that the allegations contained in the [Notice to Appear] were true, conceded that he was subject to removal, and applied for cancellation of removal."); see also A.R. 255-256, 476-485. Petitioner acknowledges this concession in his certiorari petition and makes no attempt to explain why he did not raise his claim below. See Pet. 7 ("In removal proceedings conducted in Detroit, Michigan, [petitioner] conceded removability and applied for cancellation of removal."). Because petitioner did not raise the issue before the BIA and thus failed to exhaust his administrative remedies on the claim, a reviewing court is without jurisdiction to consider it. See 8 U.S.C. 1252(d)(1). Review is also unwarranted under this Court's consistent practice of declining to review contentions not presented to or decided by the court of appeals. See, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007) (collecting cases).

In any event, the record supports the IJ's determination that petitioner is removable as charged because he committed a "crime of domestic violence." The INA provides that an alien is removable if he is convicted of a "crime of domestic violence," and it defines a "crime of domestic violence" as "any crime of violence (as defined

in section 16 of title 18) against a person committed by a current or former spouse." 8 U.S.C. 1227(a)(2)(E)(i). Under Section 16 of Title 18, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a).

Petitioner was convicted of domestic assault under a Michigan law that prohibits "assault[ing] or assault[ing] and batter[ing]" a spouse or other member of the household. Mich. Comp. Laws Ann. § 750.81(2) (West 2004); see A.R. 503, 517; Pet. 6. That crime has the attempted or threatened use of force as an element because it requires an "assault," which the Michigan courts have defined as an "intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza* v. *Thomas*, 472 N.W.2d 16, 21 (Mich. Ct. App. 1991). Thus, a conviction for domestic assault satisfies the statutory definition of a "crime of violence" under 18 U.S.C. 16(a).[4]

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[4] Petitioner contends (Pet. 18-19) that his crime was not a "crime of violence" because a person can commit a battery in Michigan by "a mere 'willful touching.'" Petitioner's reliance on the definition of battery is misplaced because, as petitioner concedes (Pet. 6), the offense to which he pleaded guilty requires an assault. Although the definition of "assault" includes "an attempt to commit a battery," *Michigan* v. *Terry*, 553 N.W.2d 23, 25 (Mich. Ct. App. 1996), this Court's categorical approach even in criminal cases does not require that "every conceivable factual offense covered by a statute must necessarily" involve use, threatened use, or attempted use of force, so long as "the conduct encompassed by the elements of the offense, in the ordinary case," would involve such conduct. *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007) (applying this approach determine whether a crime is a "violent

Moreover, even if petitioner's crime were not categorically a "crime of violence," the conviction documents make clear that his particular offense was such a crime. See *Shepard* v. *United States*, 544 U.S. 13, 26 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990). The complaint and the judgment in this case state that petitioner "did make an assault upon [his wife] with a dangerous weapon, to-wit: scissors," and that petitioner's conduct "resulted in personal injury" to his wife. A.R. 487-491, 518. Those documents demonstrate that petitioner threatened to use, and did use, physical force against his wife. See *Lopes* v. *Keisler*, 505 F.3d 58, 62-63 (1st Cir. 2007) (concluding that similar Rhode Island assault and battery offense was a "crime of violence"). Petitioner concedes (16-17) that an offense can be a "crime of violence" under this modified categorical approach, and he presents no argument regarding why his conviction was not one for a "crime of violence." Further review of petitioner's forfeited, fact-bound claim is therefore unwarranted.

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felony"). The domestic assault offense for which petitioner was convicted is a crime that "by its nature" (*ibid.*) involves the use, threatened use, or attempted use of force, and thus it qualifies as a "crime of violence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3991

TAE KYONG KIM, PETITIONER

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT

May 30, 2007

ORAL DECISION THE COURT OF APPEALS

Before: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

All right, counsel, as in the previous case, we have authority under Rule 36 of the Sixth Circuit Rules to rule from the bench if the panel is convinced that—what the result should be, and there is no jurisprudential purpose of writing a written opinion. And we do so in—and this is an appropriate case where we will do that under Rule 36; and our ruling is going to be to uphold the ruling of the Board of Immigration Appeals.

This is an unusual case—as I said, it's not the typical asylum case—but a cancellation of removal decision which raises the question of whether we have jurisdic-

tion. And if we don't have jurisdiction then obviously whether we would otherwise agree with the discretion of the Attorney General as expressed by the immigration judge and the BIA is irrelevant. And the problem is that the Section 242(a)(2)(B) does say that we have no jurisdiction to review a discretionary relief under the cancellation of removal. And the argument by the petitioner basically is that they disagree; they feel that it was an abuse of discretion in the weighing of the factors. But in the case of the *C-V-T-* which is a 1998 decision it does say you balance the equities. Well, I don't think there's really any question in our mind that the immigration judge in both hearings and the BIA in its written decisions did balance the equities.

And I do think there is a valid argument or point made by the government's counsel that you can't cloak a[n] abuse of discretion argument into a due process argument. The question is what—unless there was a lack of due process here we simply have no jurisdiction to overrule the decision, the discretionary decision of the Attorney General and we find that there was plenty of due process afforded here. I mean, obviously there was a right to be heard, a right to counsel, right to a translator, all the normal aspects of due process were carried out here by the— both the immigration judge and the Board of Immigration Appeals. Therefore we conclude that we have no jurisdiction under Section 242(a)(2)(B) and therefore we'll invect [*sic*]—I guess technically we'll probably call it a dismissal of the appeal for lack of jurisdiction. A copy of this oral ruling will be available by transcript if either party desires through the clerk's office.

I'll ask if either counsel or either of my colleagues have anything further to add? No. That will be the ruling of the court. Thank you both very much.